Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY SABO PETITIONER

VS.

CITY OF OWENSBORO RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO KENTUCKY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

DAVID MURRELL
ATTORNEY FOR PETITIONER
3006 FURMAN BLVD.
LOUISVILLE, KY. 40220
(502)452-6625

54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner, a classified employee of the city of Owensboro, Kentucky was deprived of his property interest in continued employment in violation of the due process clause of the Fourteenth Amendment when he was fired following the expiration of his twelve month statutory probationary period arbitrarily and without an opportunity for a hearing.

2. Whether Petitioner, if he be deemed a probationary employee of the city of Owensboro, Kentucky had a right to a due process hearing under the Fourteenth Amendment prior to the taking of his property interest in continued employment where he was dismissed approximately twenty months after first being employed.

PARTIES

The parties to the proceeding are: the city of Owensboro, Kentucky, The Board of Commissioners of the City of Owensboro and Waymond Morris, Dick Moore, (now deceased), Olive Burroughs, Bill Van Winkle and Jim Woods, each in his or her capacity as a member of the Board of Commissioners of the City of Owensboro.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals, the highest state court to review this case on its merits appears at Appendix A to this Petition and is unpublished. The Opinion of the Kentucky Court of Appeals was rendered on August 25, 2000.

The order of the Kentucky Court of Appeals denying Petitioner's Petition for Rehearing which was entered on October 19, 2000 appears at Appendix B to this Petition and is unpublished.

The August 15, 2001 order of the Kentucky Supreme Court, the highest court in the state of Kentucky, denying Petitioner's Motion for Discretionary Review appears at Appendix C to this Petition and is unpublished.

The order of the Daviess Circuit Court which granted Respondents' motion for summary judgment and dismissed Petitioner's cause of action was entered on March 5, 1999, is unpublished and appears at Appendix D of this Petition.

JURISDICTION

The date on which the Kentucky Court of Appeals, the highest state court to examine the merits of Petitioner's case rendered its decision was August 25, 2000. A copy of that decision appears at Appendix A.

A timely Petition for Rehearing was thereafter denied by the Kentucky Court of Appeals on October 19, 2000 and appears at Appendix B of this Petition.

The Supreme Court of Kentucky, Kentucky's highest court thereafter denied Petitioner's timely Motion for Discretionary Review on August 15, 2001. That order appears in Appendix C to this Petition.

An extension of time to file the petition for writ of certiorari was granted to and including January 12, 2002 on November 29, 2001 in Application No. 01A417.

The jurisdiction of this court is invoked under 28 USC 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or

any commission held or authority exercised under, the United States. (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

KRS 90.350(9)

(9) The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for a period of not more than twelve (12) months, after which probationary period regular appointments shall be given to all probationary employees who are deemed to be satisfactory by the respective appointing authority.

KRS 90.360

(1) No employee in the classified service of a city of the second or third class shall be dismissed, suspended, or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation

of law involving moral turpitude, or, in a city of the third class, violation of any rule adopted by the city legislative body or civil service commission. (2) Any person may prefer charges in writing against any employee by filing them with the mayor or other appointing authority who shall communicate the charges without delay to the civil service commission of the city. The charges must be signed by the person making them and must set out clearly each charge. The appointing authority shall, whenever probable cause appears, prefer charges against any employee whom he or she believes guilty of conduct justifying his or her removal. Upon the filing of charges, the clerk of the civil service commission shall notify its members and serve a copy of the charges upon the accused employee with a statement of the date, place, and hour at which the hearing of charges will begin, this hearing not to be held within three (3) days of the date of the service of charges upon the accused

employee. The day on which the charges are served on the accused employee shall count as one (1) of the days of notice. The person accused may in writing waive the service of charges and demand trial within three (3) days after they have been filed with the clerk of the civil service commission. (3) Upon the hearing, the charges shall be considered traversed and put in issue, and the trial shall be limited to the issues presented by the written charges. (4) The civil service commission shall have the power to summon and compel attendance of witnesses at all hearings by subpoena issued by the clerk of that body and served upon the witnesses by members of the police department of the city or any officer authorized to serve subpoenas. If any witness fails to appear in response to a summons or refuses to testify concerning any matter on which he may lawfully be interrogated, any District Judge, on application of the commission, may compel obedience by proceedings for contempt as

in the case of disobedience of a subpoena issued from the District Court. The accused employee shall have the right to have subpoenaed any witnesses he or she may desire, upon furnishing their names to the clerk. As many as ten (10) subpoenas may be served on the request of the accused employee without charge but each additional subpoena requested by him shall be issued by the clerk and served by the police department only upon payment of fifty cents ($0.50) to the city clerk by the employee. The action and decision of the civil service commission on the charges shall be reduced to writing and kept in a book for that purpose and the written charge shall be attached to the book containing the body's decision. (5) In cases where the head of the department or the appointing authority has probable cause to believe an employee has been guilty of conduct justifying his removal or punishment he shall immediately suspend that employee from duty or from both pay and duty pending trial and the employee

shall not be placed on duty or allowed pay thereafter until the charges are heard by the civil service commission. (6) The civil service commission shall punish any employee found guilty by reprimand or a suspension for any length of time not to exceed six (6) months, or by reducing the grade, if the employee's classification warrants, or by combining any two (2) or more of these punishments, or by dismissal. No employee shall be reprimanded, removed, suspended, or dismissed except as provided in this section. (7) (a) Any of the following offices, positions, and places of employment, in the police and fire departments of a city of the second or third class, may be excluded from the classified service: 1. Chief of police; 2. Assistant chief of police; 3. Chief of firefighters; and 4. Assistant chief of firefighters. (b) Any classified employee in either department who shall accept an appointment and qualify as chief of police, assistant chief of police, chief of firefighters, or assistant chief

of firefighters shall be deemed to have received a leave of absence from the classified service for, and during the incumbency of, any of those respective positions. If an individual should cease to serve in any of those positions, there shall be restored to him or her the same classification and rank which he or she held prior to his or her appointment.

STATEMENT OF THE CASE

The Petitioner moved to Kentucky from California to accept a recommended appointment as Director of Finance and Administration for the Respondent City of Owensboro on January 2, 1997 which became effective on Feb 1, 1997. Respondent, City of Owensboro, is a city of the Second Class which operates under the City Manager form of Government under KRS 83A.150. The City of Owensboro has adopted the provisions of KRS 90.310 to KRS 90.420, which establish the requirements for a civil service

employment structure. Respondent Mayor is a member of the Board of Commissioners. The Board of Commissioners, (hereinafter Board), is the appointing authority. City Manager Ron Payne, who is not a party to this action nor a member of the appointing authority was Petitioner's direct supervisor and an agent of the City of Owensboro.

During the twelve (12) month probationary period prescribed by KRS 90.350(9), commencing on February 1, 1997, Petitioner received only one review of his performance. That review was completed by his immediate superior, the City Manager, Ron Payne. That employee evaluation, showed that City Manager Payne thought Petitioner was doing a good job. Petitioner's work performance was satisfactory during his twelve (12) month probationary period commencing February 1, 1997.

Petitioner's twelve (12) month probationary period ended on February 1, 1998 without any

indication whatsoever either orally or in writing from Respondent Board, the appointing authority, as to whether he was to be retained as a permanent member of the classified service or discharged.

On February 11, 1998, ten days after the expiration of the twelve (12) month probationary period, the Petitioner was made aware that Alma Randolph, an African-American employee in his department, had complained to the City Manager about Petitioner's failure to confirm certain hearsay information which she had received that another employee had made derogatory remarks about her. Petitioner asked that a conciliation facilitator be chosen to investigate the situation. The whole incident was dropped in March, 1998 after the conciliator reported that Ms. Randolph did not wish to file a formal complaint.

It is undisputed that the Respondent Board, by ordinance, met the first and third Tuesdays of each

month unless there was a special session called. On April 7, 1998, over two months after the expiration of his twelve (12) month probationary period, City Manager Ron Payne, Petitioner's immediate supervisor, recommended to Respondent Board, the Appointing Authority, that Petitioner receive regular appointment to a permanent civil service position. At the April 7th meeting a closed session was held in which Petitioner was present, without an attorney, to discuss the Randolph complaint. After the closed session there was a motion made by a Board member and carried by the Board of Commissioners to table Ron Payne's motion to approve Petitioner's permanent civil service appointment.

On April 20, 1998 there was another special closed session in which the Randolph incident was again discussed. No decision was made regarding Petitioner's permanent appointment at this meeting. Subsequent to the April 20th meeting City Manager

Payne repeatedly asked Petitioner for his resignation. When Petitioner refused, a special meeting of Respondent Board was called for April 22, 1998. Prior to that meeting Mr. Payne furnished Petitioner with a copy of a job performance evaluation showing a satisfactory performance rating. He advised Petitioner that this was the evaluation he had planned to give Petitioner. However, he further advised Petitioner that the evaluation didn't matter any longer because he had polled Respondent, Board of Commissioners, and knew there were sufficient votes to discharge Petitioner.

On April 22 there was, in fact, a meeting of the Board. Ralph Wible, an attorney representing Petitioner, after a motion for Petitioner's appointment to permanent civil service employment had been made, advised Respondent, Board of Commissioners, that Petitioner would be willing to agree to an extension of his probationary period so that he could further prove

himself satisfactory. Petitioner had never previously agreed to an extension of his probation. There were concerns expressed by various Respondents that an extension of probation would not be lawful. The Board voted to extend Petitioner's probationary period to October 6, 1998.

On May 28, 1998, almost four months following the conclusion of his twelve (12) month statutory probationary period, Petitioner received the results of a supervisory assessment survey. Petitioner received a "C" rating, i.e. a score of "3.03" on a 1 to 5 scale.

On September 10, 1998 Petitioner was made aware of another job performance evaluation which scored him low in the areas of work environment and relationships with subordinates. This evaluation was furnished to the Board for its review prior to Petitioner's discharge. This evaluation's responses were false and misleading. The evaluation referenced

attached anonymous comments supposedly made in support of the low ratings.

Evaluations of this type were to be completed by Petitioner's direct subordinates. Petitioner had only four direct subordinates. Petitioner learned through Judith Woods, one of his subordinates, that a comment contained in the September evaluation had actually been made by her in the May survey. Additionally, the September evaluation results show that there were six persons who responded to the survey instead of four. Finally, Petitioner learned that one of his four subordinates, Rhonda Tipton, was not interviewed for the September evaluation.

The September job performance review results were furnished to Petitioner just before his final discharge. He had no opportunity to respond to that review. No positive remarks were attached to the survey.

Petitioner was placed on administrative leave on September 10, 1998 and was finally discharged by Respondent Board of Commissioners on September 17, 1998 without reason or an opportunity for a hearing.

On December 28, 1998 Petitioner filed his Memorandum in support of his motion for summary judgment at argument two of that memorandum Petitioner made the following contention:

> Defendants' decision to discharge Plaintiff on September 17, 1998 was arbitrary as a matter of law in violation of the Fourteenth Amendment of the United States Constitution and Section Two of the Kentucky Constitution.

In Petitioner's brief submitted to the Kentucky Court of Appeals on August 2, 1999 at argument two Petitioner presented the following contention:

> The trial court committed reversible error when it failed to grant Appellant's motion for summary judgment where Appellee's decision to dismiss Appellant was arbitrary as a matter

of law in violation of Section Two of the Kentucky Constitution and the Fourteenth Amendment of the United States Constitution.

Neither the Daviess Circuit Court nor the Kentucky Court of Appeals ruled directly on these arguments.

REASONS FOR REVIEW

This court should reexamine its prior decisions holding that employees of a municipality, while serving a probationary period, do not have a property interest that is protected by the due process clause of the 14th amendment. In Gilbert v Homar, 520 U.S. 924, (1997) this court held that to have a property interest an individual must have more than a unilateral hope in continued employment. See also Connecticut Board of Pardons v Dumschat, 452 U.S. 458 at 465 (1981). Regents of the University of Michigan v Ewing, 474 U.S. 214, (1985), held that no property

interest existed where a student sought to retake a test to enter medical school even though others had been permitted to do so. Finally, in Board of Regents v Roth, 408 U.S. 564, (1972) this court held that an untenured teacher had no property interest in continued employment because he was a probationary employee

It is unrealistic to say that a person hired and serving a pre-merit protection probationary period does not have a reasonable expectation of continued employment. In today's world it is possible through the human resources department of any major city or even a small city to completely research the background of any pre-hire interviewee. It is practicable to find out if a person has any criminal background and check out the variety of facts produced in an application for employment.

The city or government, in general, certainly has a legitimate interest in hiring good employees, but government can and should protect its interest through

pre-employment interviews and background checks and, if necessary, by dismissals for cause and after an opportunity for a hearing. It is time for this court to impress upon the government that it can not act arbitrarily toward employees who have often had to move some distance to take a new job, and change many aspects of their lives in order to meet the needs of a new employment. If there is a need to dismiss an employee, that can be accommodated by writing personnel rules that spell out the causes for dismissal. Law, as has often been stated, should not be made and enforced by the whim of one or more men but carried out according to the will of the people as expressed in written guidelines that can be reviewed objectively by others.

Petitioner asks this court to re-examine its cases for the purpose of according employees the protections of due process just as this court has accorded other classes of persons traditionally not viewed as having

protected property or liberty interests with the protections of the due process clause of the Fourteenth Amendment.

For example, this court has changed and solidified the rights of persons convicted of crimes by guaranteeing them the right to probation revocation hearings even though probation was considered a privilege and not a "right", Gagnon v Scarpelli, 411 U.S. 778 (1973). The right v. privilege rationale has also been abandoned in parole violation cases. A parolee must now receive a due process hearing prior to the revocation of his parole. Morrissey v Brewer. 408 U.S. 471 (1972).

This court has also shown its inclination, in recent years, to hold governmental entities more accountable for their actions. To that end this court has expanded the rights of a person seeking redress for civil rights violations by a city. Cities are no longer immune from a civil rights action under 42 U.S.C.

1983. Owen vs. City of Independence, 445 U.S. 662 (1980).

In this case the Petitioner moved from California to Owensboro, Kentucky where he bought a home to take a job as city finance director. The Kentucky statute KRS 90.350(9) states that a civil service probationary period can be no longer than 12 months, but in the particular facts of this case the city, and the Kentucky courts reviewing the decision of the Board of Commissioners of the city of Owensboro have held that Petitioner was still on probation approximately 20 months after being hired, and thus could be dismissed without an opportunity for a due process hearing. If there was real cause to dismiss the Petitioner the city could have used and should have been required to proceed against Petitioner under KRS 90.360 which spells out the causes for dismissal of a merit employee. Instead, the petitioner was subject to

the whims of a few men without any recourse because of his "probationary status".

It should be no less important to protect the right of all government employees to be free from arbitrary action resulting in their dismissal than it is to protect employees from sexual harassment, discrimination based on race, ethnic origin or disability. A meaningful civil service is truly in jeopardy if a governmental agency or city employer can say he dismissed such a person because he or she was on a probationary status where that governmental employer exercises sole discretion in determining when a probationary period ends notwithstanding language of a governing statute to the contrary.

Those lawyers who handle indigent defense work are frequently told: "the purpose of the law is to protect and poor and the weak from the rich and the strong." It is often said by the layman that you can't fight "city hall". All that the Petitioner requests is that,

after a successful pre-hire interview and background check, and after a favorable review during his probationary period by his supervisor, he, by law, should have the opportunity to review the reasons for such dismissal and an opportunity to be heard where he had been retained in his employment beyond the statutorily prescribed twelve month probationary period.

The issues raised by this case were issues of first impression regarding the constitutional implications and protections due city employees under KRS 90.350(9). Petitioner finds it extremely disappointing that both the trial court and Kentucky's appellate courts shirked their responsibilities to take a meaningful look at the negative implications on Petitioner's constitutional rights to protect his property interest in continued employment and to receive due process of law. The Daviess Circuit court adopted, word for word, the findings of fact and conclusions of

law submitted by Respondents in support of their opposition to Petitioner's motion for summary judgment. The Kentucky Court of Appeals reprinted that order verbatim as its unpublished opinion in this case.

Petitioner now seeks in this, the court of last resort, to have an opportunity to brief all the relevant law and facts surrounding this case and receive an objectively determined decision.

CONCLUSION

Petitioner respectfully requests that this petition for writ of certiorari be granted.

RESPECTFULLY SUBMITTED

DAVID MURRELL
ATTORNEY FOR PETITIONER
3006 FURMAN BLVD.
LOUISVILLE, KY. 40220
(502)452-6625
FAX(502)543-1962